TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 422.

J. W. LEE, PLAINTIFF IN ERROR,

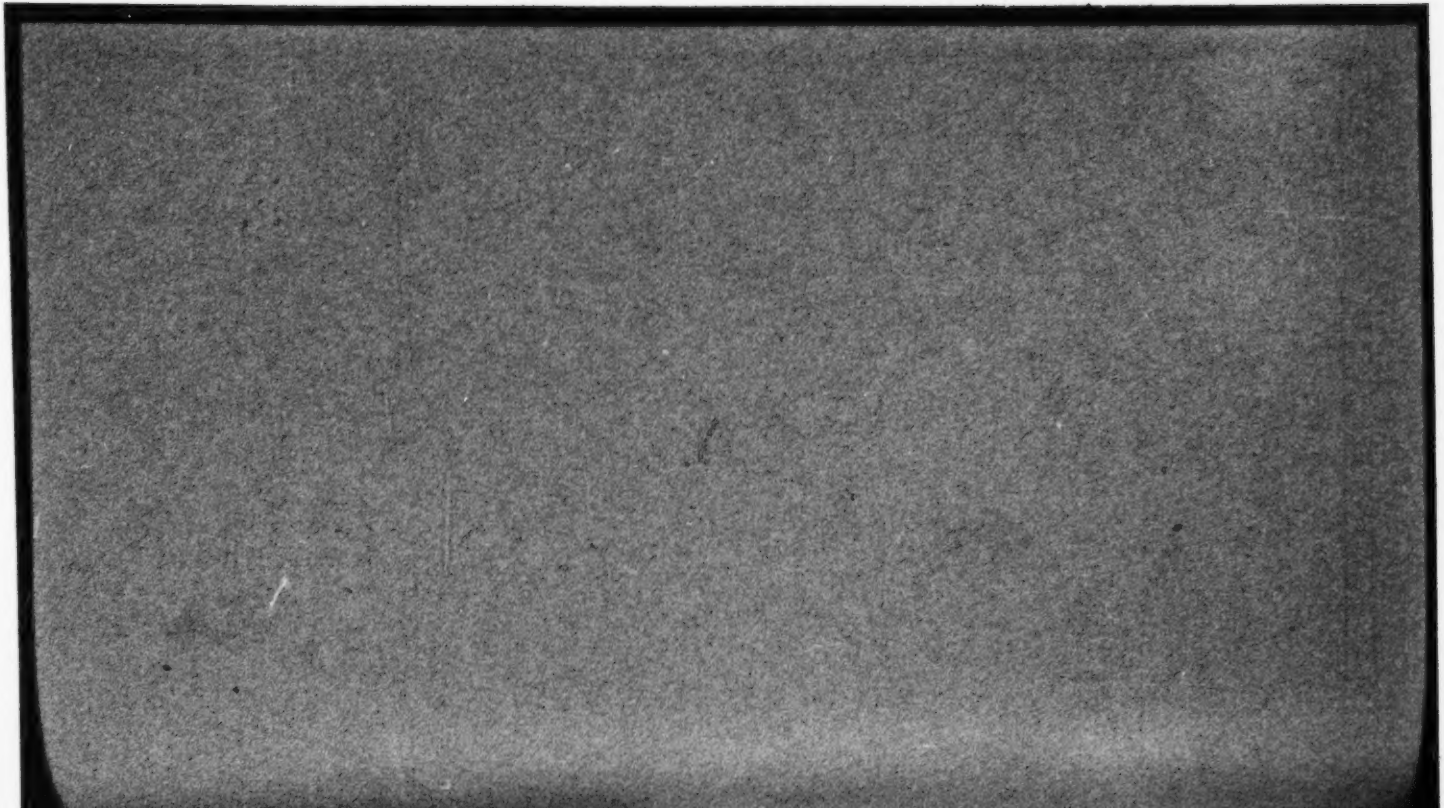
vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JUNE 9, 1922.

(28,972)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1922.

1 Proceedings Had in the District Court of the United States for the Eastern District of Kentucky at a Regular Term Begun and Held at Federal Court Hall, in the City of Covington, Ky., on Monday, April 3rd, 1922, and of Our Independence in the 146th Year.

Court Met.

Present: Hon. A. M. J. Cochran, Judge.

Order.

Ent. Mar. 20, 1922.

This day came the defendants by Worthington, Cochran, Browning and Reed, their attorneys and offered for filing a transcript of the proceedings had herein in the Bracken Circuit Court, and on their motion, the court being advised, it is ordered that said transcript be and same is now filed and placed on the law docket of this Court.

A. M. J. COCHRAN,
Judge.

TRANSCRIPT.

Filed Mar. 20, 1922.

Bracken Circuit Court.

J. W. LEE, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

TRANSCRIPT.

The plaintiff, J. W. Lee, states that he is a citizen, resident and bona fide inhabitant of the State of Texas.

2 That the defendant, Chesapeake & Ohio Railway Company is a corporation created, organized and existing under the laws of Virginia, and as such authorized to contract and be contracted with, sue and be sued and to conduct business of a common carrier of passengers and freight for hire under and by its corporate name aforesaid; and that at all times herein mentioned defendant has operated and now operates a line of railroad through Bracken County, Kentucky.

That heretofore, to wit, on the 22nd day of September, 1920, this plaintiff purchased a ticket from one of the agents of the defendant, at Augusta, Kentucky, entitling him to passage on one of the defendant's passenger trains from Augusta, Kentucky, to Covington, Kentucky, and that he then proceeded to the place where said train was

standing, ready to depart for Covington, Kentucky, and when he started to get on the train he was directed by one of the agents of the defendant, in charge of the car where he sought to board said train, to go to a car lower down on the train, and that in obedience to said instruction he went to said car and just as he arrived at the said car, the announcement was made by one of defendant's agents or servants, "All Aboard" which meant that all passengers should board said train. At said time there were several intended passengers behind him, and he endeavored to get on said car, but the defendant had carelessly and negligently failed to provide a foot-stool at the door or steps of said car and had carelessly and negligently failed to provide anyone to assist passengers in getting on said car at said place, and when said notice was given, this plaintiff, thinking that it was safe for him to board said train, attempted to get on said train and proceeded to get on the steps of the platform with his grips, but
3 on account of the fact that the distance from the first step to the platform was so unreasonably high and on account of defendant's carelessness and negligence by reason of the fact that there was no stool provided and no assistance provided by defendant, its agents and servants then and there in charge of said train or at all, this plaintiff, in attempting to get on to said steps, strained and injured his legs and knees; that as this plaintiff arose, with his grips, the distance from the platform to the said steps proved to be so unreasonably high that it was impossible for him to make the landing on said steps without a great effort, he holding his grips at said time, and that said effort resulted in the said straining and injuring of his legs and knees, as aforesaid. That but for the negligence of the defendant, its agents and servants as aforesaid this plaintiff would not have been injured.

That said strain to the legs and knees of this plaintiff has caused him great pain and agony and has resulted in a permanent injury to one of his knees so that it has become almost impossible for this plaintiff to walk and the result is that he cannot walk without constant pain and agony, on account of said injury. That he has been compelled and will be compelled to pay necessary and reasonable doctors' bills in the sum of at least Two Hundred and Fifty Dollars ($250.00) on account of said injuries; and on account of said injuries he will never be able to work as he could prior to the same. That his said knee is gradually growing worse. That at the time of his injury he was damaged by the defendant in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore, plaintiff prays that the defendant be cited and summoned to appear herein, and that on final hearing he have judgment against the defendant for said sum of Ten Thousand
4 Dollars ($10,000.00) and all costs of suit.

He also prays for such other and further relief as he may be entitled to in law and in equity.

ALLEN D. COLE,
LEDBETTER, STUART, BELL & LEDBETTER,
Attorneys for Plaintiff.

(On the back of the foregoing Petition is the following endorsements:) No. 784. In the Circuit Court of Bracken County, Kentucky. J. W. Lee, Plaintiff, v. Chesapeake & Ohio Railway Company, a corporation, defendant.

Summons.

Filed July 2nd, 1921.

A copy issued.
Att:
JESSE E. POAGE,
Clerk.

Ledbetter, Stuart, Bell & Ledbetter,
Oklahoma City, Oklahoma,
Attorneys for Pl'ff.
Allan D. Cole, of Counsel.

Summons on Petition.

The Commonwealth of Kentucky to the Sheriff of Bracken County:

You are commanded to Summon Chesapeake and Ohio Railway Company, to answer in ten days after the service of this summons, a petition filed against it in the Bracken Circuit Court by J. W. Lee, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within ten days after the service thereof to the Clerk's office of said Court.

Given under my hand, as Clerk of said Court, this 2nd day of July 1921.

JESSE E. POAGE,
Clerk.

Return on Summons.

Executed July 6, 1921, by delivering to Hugh Foley a true copy of within summons.

C. J. ERNST,
S. B. Co.,
By J. A. THOMPSON,
D. S.

At a Circuit Court Begun and Held for the County and Circuit of Bracken, at the Court House, in Brooksville, Kentucky, on Monday, November 14, 1921.

Present: Hon. C. D. Newell, Judge.

Ordinary No. 784.

J. W. LEE, Plaintiff,

against

CHESAPEAKE & OHIO RY. CO., Defendant.

On motion of the defendant it is ordered that the Petition and Bond for the removal of this case to the United States District Court for the Eastern District of Kentucky, filed herein August 1st, 1921, be and the same is hereby noted of record.

6 *Notice.*

Bracken Circuit Court.

J. W. LEE, Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Notice.

The plaintiff is hereby notified that the defendant will, on August Rule Day, to wit, on the 1st day of August 1921, file in the office of the Clerk of the Bracken Circuit Court, his petition and bond for the removal of this cause to the United States District Court for the Eastern District of Kentucky.

WORTHINGTON, COCHRAN, BROWNING & REED,
Counsel for Defendant.

Service of the above notice accepted this 20th day of July 1921.
A. D. COLE,
Counsel for Plaintiff.

Bracken Circuit Court.

J. W. LEE, Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Petition and Bond of the Chesapeake and Ohio Railway Company for Removal to the United States District Court for the Eastern District of Kentucky.

To the Honorable the Circuit Court of Bracken County, Kentucky:

Your petitioner, The Chesapeake and Ohio Railway Company states:

1. That the amount in controversy in this cause exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars. ($3,000.00);

7 2. That this cause is a suit of a civil nature; that the plaintiff, J. W. Lee, was at the time of the filing of this suit, and has been at all times since then, and still is, a citizen and resident of the State of Texas; that your petitioner, The Chesapeake and Ohio Railway Company, is a corporation created, organized and existing under and by virtue of the laws of the State of Virginia, and of no other state; that it was at the time of the institution of this suit, and has been at all times since then, and now is, a citizen and resident of the State of Virginia, and of no other state; that its chief office and place of business was, at the time of the filing of this suit, has been at all times since then, and now is, in the City of Richmond, in the State of Virginia; that your petitioner was at the time of the filing of this suit, has been at all times since then, and now is, the owner of, and engaged in the operation of a line of railway extending into and through the States of Virginia, West Virginia and Kentucky, and in and through the territorial limits of the Eastern District of Kentucky; that the chief office and place of business of your petitioner in the State of Kentucky was at the time of the filing of this suit, and has been at all times since then, and still is, in the County of Fayette, within the limits of the Eastern District of Kentucky:

3. Your petitioner desires to remove this suit into the District Court of the United States for the Eastern District of Kentucky, and has made and files herewith bond with good surety for its entering into said District Court of the United States for the Eastern District of Kentucky, within thirty days from the date of the filing of this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court if said 8 Court shall hold that this cause is wrongfully or improperly removed thereto.

4. Written notice of petitioner's intention to file this petition and bond for removal was given to plaintiff prior to the filing of same, and said notice is now filed herewith.

Wherefore, your petitioners pray this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and cause the record herein to be removed into the said District Court of the United States for the Eastern District of Kentucky and it will ever so pray.

WORTHINGTON, COCHRAN,
BROWNING & REED,
Counsel for Defendant.

STATE OF KENTUCKY,
Mason County:

I, Le Wright Browning of Mason County, in the State of Kentucky, being duly sworn, state that I am one of the attorneys for the petitioner in the above entitled cause; that none of the chief officers or agents of said petitioner reside, or are to be found in Bracken County, Kentucky; that the statements and allegations contained in the said petition are true, as I verily believe.

LE WRIGHT BROWNING.

Subscribed and sworn to before me by Le Wright Browning, this 30 day of July 1921. My commission expires February 7, 1924.

[SEAL.] MARY M. NEWELL,
Notary Public.

9 Bracken Circuit Court.

J. W. LEE, Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Bond.

Know all men by these presents, That we, The Chesapeake and Ohio Railway Company, as principal and Le Wright Browning and Stanley Reed, as sureties, are hereby held and firmly bound unto J. W. Lee, in the penal sum of One Thousand Dollars ($1,000.00) the payment thereof well and truly to be made unto the said J. W. Lee, or his heirs or assigns, we bind ourselves, jointly and severally, firmly by these present-, yet upon these conditions:

The said The Chesapeake and Ohio Railway Company having petitioned the Circuit Court of Bracken County, State of Kentucky, for the removal of a certain cause of action therein pending, wherein J. W. Lee is plaintiff, and The Chesapeake and Ohio Railway Company is defendant, to the District Court of the United States in and for the Eastern District of Kentucky;

Now, if the said The Chesapeake and Ohio Railway Company shall enter into the said District Court of the United States in and for the Eastern District of Kentucky, within thirty days from the filing of said petition for removal herein, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to be in full force and effect.

10 Witness our hands this 30th day of July, 1921.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By WORTHINGTON, COCHRAN, BROWNING & REED,
Atty-.
LE WRIGHT BROWNING.
STANLEY REED.

STATE OF KENTUCKY,
Mason County, sct:

We, Le Wright Browning and Stanley Reed, of Mason County, in said State, sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the State of Kentucky, and property holders therein; that we are each of us worth the sum of One Thousand Dollars ($1,000.00) over and above all our debts and liabilities, and exclusive of property by law exempt from execution, and that we each have property in the State of Kentucky, liable to execution of the value of more than One Thousand Dollars ($1,000).

LE WRIGHT BROWNING.
STANLEY REED.

Subscribed in my presence by Le Wright Browning and Stanley Reed, and by them sworn to before me this 30 day of July, 1921. My commission as Notary Public expires February 7th, 1924.

[SEAL.] MARY M. NEWELL,
Notary Public.

Bracken Circuit Court, March Term, March 6th, 1922.

J. W. LEE, Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Order.

11 The Court having considered the petition and bond of the defendant for the removal of this cause to the United States District Court for the Eastern District of Kentucky, and being sufficiently advised, it is ordered and adjudged that said bond be, and the same is hereby approved.

It is further ordered and adjudged that said petition for removal be, and the same is hereby, sustained, and it is now ordered that this cause be removed to the said United States District Court for the Eastern District of Kentucky.

To all of which the plaintiff objects and excepts.

STATE OF KENTUCKY,
Bracken County, sct:

I, Jesse E. Poage Clerk of the Circuit Court, within and for the County and State aforesaid do hereby certify, that the foregoing 11 pages annexed hereto contain a full, true and correct copy of transcript of the records, in the action wherein J. W. Lee is plaintiff and the Chesapeake and Ohio Railway Company, is defendant, in said Court, as the same appears of record in my office, as Clerk aforesaid.

Given under my hand at Brooksville, Bracken County, Kentucky this 16th day of March, 1922.

JESSE E. POAGE,
Clerk Bracken Circuit Court.

12 *Motion.*

Filed Mar. 20, 1922.

Defendant, Chesapeake & Ohio Rwy. Co. by its counsel, moves the Court for a rule against plaintiff, J. W. Lee, to show cause why he should not make a deposit for costs as required by the rules of this Court.

WORTHINGTON, COCHRAN, BROWNING & REED,
Counsel for Defendant.

Order.

Filed Mar. 20, 1922.

This cause coming on to be heard upon the motion of the defendant for a rule against plaintiff to show cause why he should not make a deposit for costs as required by the rules of this court, the court being advised, it is now ordered that a rule issue against plaintiff, returnable in thirty days requiring him to appear and make deposit for costs as aforesaid.

It is further ordered that said rule may be served by mail addressed to plaintiff, or his attorney of record, at their known post office address.

A. M. J. COCHRAN,
Judge.

Rule.

Filed Mar. 20, 1922.

The President of the United States of America to J. W. Lee, Greeting:

You are hereby cited and admonished to be and appear before our District Court of the United States, within and for the Eastern District of Kentucky, on 20th day of April, 1922, at 9:00 o'clock A. M.

at Covington, Ky., to show cause, if any you know or have why plaintiff should not make a deposit of $20.00 to cover costs
13 as they accrue herein.

Witness the Honorable A. M. J. Cochran, Judge of said Court and the seal thereof, this 20th day of March A. D. 1922.

Attest:

J. W. MENZIES,
Clerk.
By J. A. BODKIN,
D. C.

Original mailed to Allan D. Cole, Attorney, Maysville, Kentucky, March 20, 1922.

J. W. MENZIES,
Clerk,
By J. A. BODKIN,
D. C.

Motion.

Filed Mar. 31, 1922.

Now comes the plaintiff J. W. Lee and upon the authority of 23 R. C. L. 818, and In Re Moore 207 U. S. 507, moves this court to remand the above entitled cause to the Circuit Court in and for the County of Bracken, in the State of Kentucky, on the ground that this Court is without jurisdiction to hear and determine the cause.

ALLAN D. COLE,
Attorney for Plaintiff.

The foregoing motion is endorsed as follows:

Opinion.

I have considered the question raised by the motion in L. & N. R. R. Co. v. W. U. Tel. Co. 218 Fed. 91. I adhere to the position there taken and hence overrule the motion.

Apr. 5, 1922.

A. M. J. COCHRAN,
Judge.

Order.

Ent. Apr. 5, 1922.

This day came the plaintiff by attorney and moves the Court to remand this cause to the Bracken Circuit Court whence it came;
14 the court having considered said motion and being advised, overrules same, to which ruling of the court, plaintiff by counsel objects and excepts.

A. M. J. COCHRAN,
Judge.

Judgment.

Ent. May 5th, 1922.

The court having overruled plaintiff's motion to remand this cause to the Bracken Circuit Court, and plaintiff having elected to stand upon this motion to remand and refusing to recognize the jurisdiction of the United States or to proceed with the prosecution of his cause therein; it is upon motion of defendant ordered and adjudged that said cause be and the same is hereby dismissed; and that plaintiff take nothing by his suit; and that the defendant go hence without day and recover of the plaintiff its costs herein expended.

To all of which plaintiff objects and excepts.

A. M. J. COCHRAN,
Judge.

Petition for Allowance of Writ of Error or Appeal to the United States Supreme Court Direct on Question of Jurisdiction.

(Filed May 5, 1922.)

To the Honorable the Justices of the Supreme Court of the United States or any Associate Justice thereof or to the Honorable A. M. J. Cochran, District Judge of the United States District Court for the Eastern District of Kentucky:

Your petitioner, J. W. Lee, respectfully represents that there is manifest error committed by the final judgment propounded in this case on the 5th day of May 1922, in and by which said final judgment this court assumed jurisdiction of the cause set forth in your petitioner's bill of complaint and undertook to and did render a final judgment therein to the exclusion of the Bracken Circuit Court, whereby said judgment became and is a bar to further proceedings in said Court.

15 Wherefore, your petitioner considering himself aggrieved, prays an order granting a writ of error or appeal from said final judgment entered, as aforesaid, to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said writ of error or appeal be allowed solely upon said question of jurisdiction, and that the transcript of so much of the record, proceedings, and papers upon which said judgment was made as may be necessary to present said question of jurisdiction on writ of error or appeal, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner herewith files, and offered to file, his bond in the penal sum of $500.00 and asks that the same be approved, and that the writ of error or appeal be granted.

ALLAN D. COLE,
Counsel for Plaintiff.

Writ of Error.

Filed May 5, 1922.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court, before you, between J. W. Lee, Plaintiff and The Chesapeake and Ohio Railway Company, defendant, a manifest error hath happened to the great damage of the plaintiff, J. W. Lee, and it being fit that the error, if any there hath been, should be duly corrected, and full and
16 speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia thirty days after date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. William H. Taft, Chief Justice of the Supreme Court of the United States, this 5th day of May A. D. 1922, and of the Independence of the United States the 146th.

J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Covington.

Allowed by
A. M. J. COCHRAN,
United States District Judge.

Citation.

Filed May 5, 1922.

UNITED STATES OF AMERICA, *ss:*

To the Chesapeake and Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the District

Court of the United States for the Eastern District of Kentucky for
a final judgment signed, filed and entered on the 5th day of
17 May, 1922, in that certain suit wherein J. W. Lee is plain-
tiff and appellant, or plaintiff in error, and you are defendant,
and appellee or defendant in error, to show cause, if any there be,
why the final judgment rendered against the said appellant or plain-
tiff in error, as in the said order allowing the writ *or* error or appeal
mentioned, should not be corrected and speedy justice should not be
done to the parties in that behalf.

Witness the Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, this 5 day of May A. D. 1922, and of the Independence of the United States the 146th.

A. M. J. COCHRAN,
Judge of the District Court of the United States for the Eastern District of Kentucky.

Received copy and acknowledged service of the within citation this 5th day of May 1922.

WORTHINGTON, BROWNING & REED,
Attorneys for Defendant in Error.

Writ of Error Bond.

Filed May 5, 1922.

Know all men by these presents:

That, we, J. W. Lee, as principal and C. L. Wood as surety, are held and firmly bound unto the above named The Chesapeake & Ohio Railway Company in the penal sum of $500, to be paid to the said party; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, and successors, jointly and severally, firmly by these presents.

18 Sealed with our seals and dated the 5th day of May in the year of our Lord, Nineteen Hundred and twenty two.

Whereas, the above named J. W. Lee, has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Judge of the District Court for the Eastern District of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named J. W. Lee, shall prosecute said appeal to effect and answer all damages and costs if he shall fail to make said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

J. W. LEE,
By A. D. COLE,
Attorney.
C. L. WOOD.

The foregoing bond is approved this 5th day of May, 1922.

A. M. J. COCHRAN,
District Judge.

Assignment of Errors.

Filed May 5, 1922.

Now comes the above named plaintiff in error, J. W. Lee, by Allan D. Cole, his attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

I.

That the United States District Court for the Eastern District of Kentucky erred in holding and deciding that the said court
19 had jurisdiction to try and determine said suit, and in rendering its judgment dismissing plaintiff in error's petition therein on that ground.

II.

That said court erred in overruling plaintiff in error's motion to remand said cause to the Circuit Court of Bracken County, Kentucky.

III.

That said court erred in holding and deciding that Ex parte Wisner 203 U. S. 449 has been indirectly overruled and in refusing to follow it herein; and in holding, in effect, that the United States Supreme Court in rendering said opinion was not aware of the state of judicial opinion, including that of Justices Brewer and Gray, and of the opinion of text book writers in regard to the position taken therein.

IV.

That said court erred in not holding and deciding that section 28 of the United States Judicial Code restricts the right of removal of cases from State to Federal Courts to cases of which Federal Courts are given original jurisdiction and where the jurisdiction is founded only on diversity of citizenship, that section 51 thereof restricts with certain exceptions, the bringing of suits to the residence either of the plaintiff or the defendant.

V.

That said court erred in holding and deciding said cause to be removable, and in not remanding same to the Circuit Court of Bracken County, Kentucky.

Wherefore, the said J. W. Lee, prays that the judgment and order of the said District Court of the United States for the Eastern District of Kentucky, brought on error or appealed from herein, be reversed.

ALLAN D. COLE,
Counsel for Plaintiff in Error.

Order.

Entered May 5, 1922.

Now, on this 5th day of May, 1922, there is presented to the Honorable A. M. J. Cochran, District Judge of the United States District Court for the Eastern District of Kentucky, a petition for a writ of error or appeal to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, a citation directed to said appellee, the Chesapeake & Ohio Railway Company citing and admonishing it to appear in the Supreme Court of the United States of America not exceeding thirty days from and after the day the citation bears date, and an assignment of errors, which said petition for writ of error is allowed; said citation signed, said assignment of errors filed, and the order of the District Judge filed approving the writ of error bond in the sum of $500.00 which said bond is also filed.

A. M. J. COCHRAN,
Judge.

Præcipe.

Filed May 5, 1922.

The above named plaintiff having petitioned this court, for writ of error from the order and judgment made in this cause on the 5th day of May, 1922, dismissing his petition on consideration of the question of jurisdiction only, and such writ of error, having, by order of this court, been granted on said question of jurisdiction alone, and the further order made therein that so much of the record and proceedings and papers upon which said decree was made as might be necessary to present the said question of jurisdiction, and no more, be included in the record on appeal.

Now, therefore, it is hereby ordered that the following pleadings, proceedings and documents on file in said cause be included in the record on appeal:

(1) The citation to be used herein requiring the defendant to appear in the Supreme Court of the United States on this appeal and proof of service thereof.

(2) The original petition.

(3) The summons issued to the defendant and proof of its service.

(4) The petition of defendant for removal.

(5) The motion of plaintiff — remand and the order overruling same.

(6) Opinion of Cochran, District Judge, on motion to remand.

(7) All minutes of the court and orders and judgments made in the case.

(8) All certificates made by the Clerk of this court with reference to the proceedings, rulings and judgments of the court herein.

(9) The petition for writ of error, order of the court granting such writ of error, and the said writ allowed, the assignments of error of the plaintiff upon this writ of error, and the undertaking on writ of error, and all orders of the court and of the judge in Chambers relating thereto.

(10) The certificate of the Clerk of the correctness of the record on appeal in this cause.

22 (11) All orders of filings and acknowledgment and proof of service of all papers mentioned above.

ALLAN D. COLE,
Counsel for Plaintiff.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, Clerk of the District Court of the United States for the district aforesaid, do hereby certify the above and foregoing to be a full, true and correct transcript of the record in the case of J. W. Lee vs. Chesapeake and Ohio Railway Company, as required by the præcipe of plaintiff in error filed in this case.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Covington this 22nd day of May, 1922.

[Seal of the U. S. District Court, East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky,
By J. O. HOSKEN,
D. C.

23 United States District Court, Eastern District of Kentucky.

J. W. LEE, Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Citation.

Filed May 5/22. J. W. Menzies, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the Chesapeake and Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty day*d* from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Kentucky for a final judgment signed, filed and entered on the 5th day of May, 1922, in that certain suit wherein J. W. Lee is plaintiff and appellant, or plaintiff in error, and you are defendant, and appellee or defendant in error, to show cause, if any there be, why the final judgment rendered against the said appellant or plaintiff in error, as in the said order allowing the writ *or* error or appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, this 5 day of May, A. D. 1922, and of the Independence of the United States the 146th.

A. M. J. COCHRAN,
Judge of the District Court of the United States for the Eastern District of Kentucky.

24 Received copy and acknowledged service of the within citation this 5th day of May, 1922.

WORTHINGTON, BROWNING & REED,
Attorneys for Defendant in Error.

24½ [Endorsed:] J. W. Lee, Plaintiff, vs. The Chesapeake & Ohio Railway Co., Defendant. Citation.

Endorsed on cover: File No. 28,972. E. Kentucky D. C. U. S. Term No. 422. J. W. Lee, plaintiff in error, vs. Chesapeake and Ohio Railway Company. Filed June 9th, 1922. File No. 28,972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 422.

J. W. LEE,

Plaintiff in Error,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant in Error.

In Error to the United States District Court for the Eastern District of Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

E. L. WORTHINGTON,
Counsel for Defendant in Error.

LEWRIGHT BROWNING,
STANLEY REED,
Of Counsel.

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In Error to the United States District Court for the Eastern District of Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

May It Please the Court:

On July 2, 1921, plaintiff in error filed his petition against the defendant in error, in the Circuit Court of Bracken County, Kentucky, to recover $10,000.00 in damages for a personal injury to him caused, as alleged, by the negligence of the defendant in error.

Plaintiff in error was a citizen and resident of the State of Texas. Defendant in error was a corporation

created by and organized under the laws of the State of Virginia.

After due notice, defendant in error filed, in the Bracken Circuit Court, its petition for the removal of the action to the United States District Court for the Eastern District of Kentucky. Bracken County is located within the boundaries of the Eastern District of Kentucky. The state court ordered the removal asked for and thereafter, in proper time, defendant in error filed a transcript of the record in said United States District Court. Plaintiff in error appeared in that court and moved to remand the case to the State Court. This motion was overruled by the District Court. Plaintiff in error thereupon elected to stand on his motion to remand, and refused to recognize the jurisdiction of the United States District Court, or to proceed further with the prosecution of his action therein. That court thereupon dismissed the suit. This writ of error was thereafter sued out to reverse this judgment.

ARGUMENT.

The only question involved on this writ is the jurisdiction of the United States District Court for the Eastern District of Kentucky. The ground upon which the plaintiff in error contends that said court had no jurisdiction on removal was that neither plaintiff nor defendant was a resident of said district.

Section 24 of the Judicial Code says:

> "The district courts shall have original jurisdiction as follows: Of all suits of a civil nature at common law or in equity * * * where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and * * * is between citizens of different states."

Section 28 of the Judicial Code, which is the removal section, provides among other things, as follows:

> "Any other suit of a civil nature of which the district courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought in any State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein being non-residents of that state."

This language of Section 28 differs from the removal section in the Act of 1887-8 in using the words "District Courts", instead of "Circuit Courts", and in the use of the words "by this title", instead of the words "by the preceding section". The latter change, that is, the use of the words "by this title" was evidently caused by the fact that the jurisdictional section of the Judicial Code is not the section next preceding the removal section, and, further, that jurisdiction is given by the Judicial Code to the District Court of the United States by sections other than those mentioned in the 25 sub-sections of Section 24, to-wit, by Sections 30, 31, 33 and 34.

In both these removal statutes, it will be noticed that the plural "courts" is used, and not the singular "court", in defining what cases may be removed. Cases that can be removed are "any other suit of a civil nature of which the District *Courts* of the United States are given jurisdiction by this title".

This makes inevitable the conclusion reached by this court in construing the Act of 1887-8 in *Mexican National Ry. Co. vs. Davidson,* 157 U. S., 201, which is quoted with approval by this court in its opinion *In Re Moore,* 209 U. S., 490, as follows:

> "It is true that by the first section where the jurisdiction is founded on the diversity of citizenship, suit is to be brought only in the district of the residence of the plaintiff or the defendant, but this restriction is a personal privilege of the defendant, and may be waived by him. Section 2, however (which was the removal section), refers to the *first* part of Section 1, by which jurisdiction is conferred, and *not to the clause relating to the district in which suit may be brought.*"

This was the settled opinion of this court even under the Act of 1887-8, and even though the venue clauses of the statute may at that time have been contained in Section 1, *i. e.,* the preceding section. Much more would it follow that that conclusion should apply under the Judicial Code, where the venue clause is not contained in the same section as the jurisdictional clause, but in a separate clause, to-wit, Section 51.

This point is thus decisively put by Mr. Justice Brewer in the case of *Kansas City R. Co. vs. Interstate Lumber Co.,* 37 Fed., 3, where, discussing the Act of 1887-8 and quoting from the opinion of this court in *Ex Parte Schollenberger,* 96 U. S., 37, to the effect that the clause prescribing where a suit should be brought is a personal exemption in favor of the defendant, he says:

"Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts *in the plural.* Any suit is removable of which *any* Federal Circuit Court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts, *does not destroy the general jurisdiction of federal courts or prevent its removal.* Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court? I am aware that in the case of *Harold vs. Mining Co.,* 33 Fed. Rep., 529, I concurred with Judge Hallett in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous."

It is thus settled by numerous decisions that the word "jurisdiction" in Sec. 2 of the Act of 1887-8, and Sec. 29, Judicial Code, means jurisdiction of *the subject matter* of the suit, and not jurisdiction of the *person* of defendant.

From the foregoing considerations it follows inevitably that the District Courts of the United States are given jurisdiction of such a suit as the present one. It is a suit involving more than $3,000.00, exclusive of interest and costs, and it is between citizens of different states.

The remaining question and the only question about which there is any room for differences of opinion is

whether or not the District Court of the United States for the Eastern District of Kentucky is the "proper district" specified in Section 28 of the Judicial Code.

That it is not was squarely decided by this court in *Ex Parte Wisner,* 203 U. S., 449.

Our positon is that this decision on this point is unsound, and should be overruled.

Three questions were decided in *Ex Parte Wisner:*

1. *Mandamus* is a proper remedy to compel a lower Federal Court to grant a motion to remand. On this point the opinion in the *Ex Parte Wisner* case was expressly overruled by this court in *Ex Parte Harding,* 219 U. S., 363.

2. A Federal Court to which a case is removed which is not the district of the residence of either the plaintiff or defendant has no jurisdiction to hear and decide it even though both of the parties consented to the Federal Court's trying it. This point was expressly overruled in *Re Moore,* 209 U. S., 490, and *Western Loan & Saving Co. vs. Butte & Boston Mining Co.,* 210 U. S., 368.

There thus remains of the Wisner opinion only the question whether the District Court of the United States to be held in the boundaries of the district in which the case is pending in the State Court is "the court for the proper district".

We maintain that it is.

One of three conclusions only is conceivable as possible as to the purport of the word "for the proper district" in Sec. 28 of the Judicial Code.

They are:

1. In cases where neither of the parties is a resident of the district in which the case is pending in the State Court, there is *no proper* district to which the case can be removed.

2. The "proper district" specified in that section is, in a transitory action, the district of the residence of either the plaintiff or defendant, in case the Federal Court's jurisdiction depends on diversity of citizenship, or the district of defendant's resident where it is a suit by an alien against a citizen of the United States, or its jurisdiction depends on some of the other grounds mentioned in Secs. 24, 25, 26, 30, 31, 33 or 34 of the Judicial Code. In other words, the words "for the proper district" in Sec. 28 refer to the court specified in Sec. 51 of the Judicial Code.

3. The "proper district" is the district in which the suit is pending in the State Court, as specified in Secs. 29, 30, 31 and 33 of the Judicial Code.

Our position is the words "for the proper district" in Sec. 28 mean the district specified in Secs. 29, 30, 31 and 33, and not the district specified in Sec. 51, and that, therefore, the decision to the contrary in *Ex Parte Wisner* is unsound.

Our positions are, in brief:

1. The remaining point in *Ex Parte Wisner,* not yet overruled in terms is inconsistent with, and *in effect* overruled by, the decision of this court in *Re Tobin,* 214 U. S., 506, and *General Investment Co. vs. Lake Shore & Mich. So. Ry.,* decided by this court November 27, 1922.

2. It is unsound and in violation of the provisions of the Removal Act, contained in the Judicial Code, Sec. 28, and the corresponding section in the Judiciary Act of 1887-8.

The removal section of the Act of 1887-8 and Section 28 of the Judicial Code (which is substantially identical with the removal section of the Act of 1887-8), do not refer to the district in which the suit may be brought. The district in which a suit may be brought applies to suits by aliens against citizens, as well as suits between

citizens. The point presented in *Re Tobin,* 214 U. S., 506, and *General Investment Co. vs. Lake Shore & Mich. So. Ry. Co., supra,* is, therefore, identical with the point presented in the present case, so far as the removability of the suit to the Federal Court to which it was removed is concerned. The *mode* of raising that question alone distinguishes the Tobin case from the present case.

This court in *Re Winn,* 213 U. S., 458, had presented to it the question whether when a suit was improperly removed from a State to a Federal Court, a writ of mandamus was the proper remedy to enforce the remand. The opinion in that case elaborately discusses the question and holds that it was. This opinion was delivered May 3rd, 1909. In that same month of May, the case of *Re Tobin,* 214 U. S., 506, was decided by this court. It involved solely the question whether the case was removable under Section 2 of the Act of 1887-8. The sole ground upon which it could have been held that the mandamus asked for should not be granted was that the case was not a removable one, or else that it had not been removed to the proper district, for the reason that it had not been removed to the district of the residence of defendant. Yet this court refused to grant the mandamus. It therefore decided (1) that the case was removable, and, (2), that it had been removed to the proper district. The court to which the removal had been made was the court of the district in which the suit had been pending in the State Court, and not the court of the district of defendant's residence. This case is in square conflict with, and, in effect, overrules the third point decided in *Ex Parte Wisner,* 203 U. S., 499, unless we assume that it was decided on the ground that mandamus was not a proper remedy. It is inconceivable that this court should have thus, in effect, overruled in *Re Winn,* in which it had been held that mandamus was a proper remedy, after an

elaborate discussion of the matter, and that it should have done this in a memorandum opinion delivered in the same month in which in *Re Winn* was decided. That mandamus was not a proper remedy to enforce the remand of a case was never decided by this court until nearly two years after the decision in *Re Winn,* to-wit, in *Ex Parte Harding,* 219 U. S., 363.

On principle we maintain (excluding from consideration the mode of raising the question) that in *Re Tobin,* 214 U. S., 506, was correctly decided, and that therefore, it inevitably follows that the third point in *Ex Parte Wisner,* 203 U. S., was not correctly decided.

Section 29 of the Judicial Code, in terms, requires a defendant seeking a removal from a State to a Federal Court, to file a petition in the State Court for the removal of such suit into the District Court, *to be held in the district where said suit is pending.* It further requires him to make and file in said State Court a bond with good and sufficient surety for his entry in such district court, *i. e.,* the district court in which the suit is pending, a certified copy of the record in such suit, and for paying all costs that may be awarded by said District Court if said court shall hold that such suit was wrongfully or improperly removed thereto. To say that the Federal District Court to which defendant is required to *ask* to have it removed is not the *proper* district specified in Section 28 is to make Sections 28 and 29 of the Judicial Code contradict one another, and reduce the statute to an absurdity. It would require a defendant to *ask* to have a case removed to a court which had no jurisdiction to hear and decide it.

Furthermore, Section 53 of the Judicial Code provides that "In all cases of removal of suits from the courts of a state to the District Court of the United States, such removal shall be to the United States *District Court*

in the division in which the county is situated from which the removal is made". This section expressly requires removal to be made not only to a particular division of a district, but to a particular district. To say that the District Court in the division in which the county is situated from which the removal is made is not identical with the proper district specified in *Section* 28 is to make *Section 53* of the Judicial Code squarely conflict with *Section 28.*

These sections of the Judicial Code definitely define what is the "proper district" referred to in *Sec. 28.* Furthermore this court has distinctly decided in many cases, and distinctly says in its opinion in *Re Moore,* 209 U. S., 490, that Sec. 2 of the Act of 1887-8 (which is, in substance, Sec. 28 of the Judicial Code) does not refer to Sec. 1 of the Act of 1887-8 (which is Sec. 24 of the Judicial Code). And it is *Sec. 51* alone that requires a suit to be brought in the district of the residence of plaintiff or defendant.

Section 28 of the Judicial Code gives a right of removal to defendants who are non-residents of the district in which the suit is pending of *all* cases of which those courts are given jurisdiction by that Code. And the word "jurisdiction" in *Sec. 28* means jurisdiction of the *subject matter* of the suit, and has no reference to jurisdiction of the person. To construe that section as giving a right of removal in cases where process has not been or can not be served is to construe it so as to read "any other suit of a civil nature at law or equity of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought in any State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein being non-residents of the state, *provided there is any*

district in which the plaintiff may be served with process." To so read Sec. 28 is not to construe, but to legislate. It would be to make Sec. 28 read so as to give to a *plaintiff* a right not given to him by any statute, a right to *take away* from a defendant a right expressly and in terms given to him by Section 28. To say that a non-resident may remove any suit of a certain character and that there is no proper district to which he can remove it is a contradiction in terms. To so construe Sec. 28 of the Judicial Code is to make one part of it contradict another, and this contradiction is made the more glaring when another section of the same statute (Sec. 29) explicitly provides that he shall *ask* to have it removed to the District Court of the United States in which the suit is pending and that he shall execute a bond to file in *said* court a certified copy of the record.

The decision of this court in *Ex Parte Wisner* is based entirely upon the conclusion there reached that the clause in Sec. 1 of the Act of 1887-8 describing in what courts suits may be brought, is a limitation on the *jurisdiction* of the Federal Court, as that word "jurisdiction" is used in the second section of that act, which corresponds with Sec. 51 of the Judicial Code. This conclusion is in square conflict with what this court said in the later case of in *Re Moore*, 209 U. S., 490, where it says, referring to Sec. 2 of the Act of 1887-8:

> "Section 2, however, refers to the first part of Section 1; by which jurisdiction is conferred, *and not to the clause relating to the district in which suit may be brought.*"

It is said in the opinion in *Ex Parte Wisner*, that a petition for removal is in the nature of process, that is, of process to bring the plaintiff from the State Court into the Federal Court. To say that it is in the nature of process is a very different thing from saying that it *is*

process. Besides, the venue clause of the Act of 1887-8, as well as Sec. 51 of the Judicial Code, speaks of *original* process. Even if it be conceded that a petition for removal is in the nature of process, it is not *original* process. To remove a cause from a State Court to a Federal Court is not to bring a new suit, but to continue a cause already theretofore pending in the State Court.

It is sometimes said in some opinions of this court, that no suit can be removed to a Federal Court which could not be originally brought therein. In all cases, so far as we are aware, that is a pure dictum. The point has never been expressly decided. Furthermore, the language of the removal statute contains nothing that would indicate that a suit might not be removed to a Federal Court which could not be originally brought therein. Besides, a suit may be brought in a Federal Court, and properly brought in a Federal Court, of which that court has jurisdiction, as prescribed by Sec. 1 of the Act of 1887-8, and the corresponding section of the Judicial Code. There may be cases of that kind in which the defendant can not be *served with process* within the district, but he may enter his appearance and waive the service of process, and thereby give the court complete jurisdiction over his person, and the court would already have complete jurisdiction of the subject matter of the suit, under the terms of the Act of 1887-8 and the Judicial Code. There is nothing in the removal statute that requires a defendant before filing a petition for removal, to be served with process. He may appear in the action and file his petition for removal, and then raise the objection in the Federal Court that process was not properly served upon him. The defendant alone could thus raise that question. No statute gives to the plaintiff the right to raise any such question, or to put his veto on the right given to the defendant.

The point involved on this writ of error has been exhaustively and ably discussed in numerous opinions of the lower Federal Courts, decided since this court's decision in *Ex Parte Wisner*. Any further discussion on our part would be only a reiteration of the views there expressed, and we, therefore, refrain from quotations from those opinions. We refer to the elaborate opinions of Judge Cochran in *Louisville & Nashville R. Co. vs. Western Union Telegraph Co.*, 218 Fed., 91, and of Judge Ervin in *James vs. Amarillo Co.*, 251 Fed., 337, and *Hohenberg & Co. vs. Mobile Liners*, 245 Fed., 169, and *Earls vs. Germaine Co.*, 265 Fed., 715, and of Judge Newman in *Sanders vs. Western Union Telegraph Co.*, 261 Fed., 697, and of Judge Ray in *Matarazzo vs. Hustis*, 256 Fed., 882. The opinions in these cases contain a full and elaborate discussion of the question here involved and an exhaustive review of the authorities.

The case of *General Investment Co. vs. Lake Shore & Mich. So. Ry. Co. et al.*, decided by this court on November 27, 1922, is, we submit, decisive of the question presented in the present case. That was a suit brought by a corporation of Maine against an Ohio corporation and a New York corporation. It was brought in the Court of Common Pleas of Cuyahoga County, Ohio, which is located within the boundaries of the Northern District Court of the United States. The New York corporation was an indispensable party to the suit, and of course, being neither a citizen of nor resident within the Northern District of Ohio, process could not be served upon it under Section 51 of the Judicial Code without its consent. The two corporations joined in a petition to remove the case to the United States District Court for the Northern District of Ohio, and plaintiff in that court moved to remand to the State Court. In refusing to remand it, this court, in an opinion delivered by Mr. Justice Van Devanter, said:

"The ground on which the plaintiff moved that the cause be remanded to the State court was that, as the New York Central Company, one of the defendants, was not an inhabitant of the Northern District of Ohio, the suit could not have been originally brought in the District Court for that district, and therefore could not be removed into it from the State Court. The motion was denied.

As we shall show, the argument advanced against that ruling confuses venue with general jurisdiction and also confuses the venue prescribed for cases begun in the District Courts with that prescribed for cases removed into them from State Courts.

Section 24 of the Judicial Code declares that—

'The District Courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or Laws of the United States, or treaties made, or which shall be made, under their authority or (b) is between citizens of different States, * * *'

This provision covers two distinct classes of suits. In one the distinctive feature consists in the fact that the suit arises under the Constitution, or a law or treaty, of the United States, the citizenship of the parties not being an element; while in the other the distinctive feature consists in the fact that the parties are citizens of different states, the particular basis or ground of the suit not being an element. This suit was within the first class, and, the requisite amount being involved, it came within the general jurisdiction of the District Courts as defined by Sec. 24.

Section 51 deals with the venue of suits begun in those courts and provides, subject to exceptions not material here, that—

'* * * no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the

action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.'

This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a *personal privilege of the defendant*, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege. *Central Trust Co. vs. McGeorge*, 151 U. S., 129; *Interior Construction Co. vs. Gibney*, 160 U. S., 217; *In Re Moore*, 209 U. S., 490, 501; *United States vs. Hvoslef*, 237 U. S., 1, 12; *Camp vs. Gress*, 250 U. S., 308, 311.

It therefore can not be affirmed broadly that this suit *could not have been brought against the New York Central Company in the District Court for the Northern District of Ohio, but only* that it could not have been brought and maintained in that court over a reasonable objection by the company to being sued there. And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company declined to yield the necessary jurisdiction of its person. *Mason Grocery Co. vs. Atlantic Coast Line R. R. Co.*, 215 U. S., 501, 503, 508.

Respecting the jurisdiction of the District Courts on removal from State Courts, Sec. 28 of the Judicial Code, declares:

'Any suit of a civil nature at law or in equity, arising under the Constitution or Laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other

suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. * * *'

The next section (29) provides that the removal shall be 'into the District Court to be held in the district where such suit is pending'; and Sec. 53 provides that where the district is separated into distinct divisions the removal shall be into the District Court 'in the division in which the county is situated from which the removal is made.'

Shortly after the original enactment of the removal provisions now embodied in Secs. 28 and 29, the meaning of the words 'the proper district', found in Sec. 28, was drawn in question; and the courts, on examining the entire statute, very generally reached the conclusion that the words mean the district which includes the county or place where the suit is pending at the time of the removal. Subject to exceptional departures soon disapproved, that view has prevailed ever since, and *we regard it as obviously right.*

From what has been said it seems plainly to follow that this suit was removable and that the removal was to the District Court for the proper district. But the plaintiff insists that this view does not give due effect to the clause in Sec. 28, 'of which the District Courts of the United States are given original jurisdiction', and the provision in Sec. 51, respecting the place of suit or venue. These, it is argued, show that removability is not to be determined by inquiring merely whether the particular suit is one of which Sec. 24 says the District Courts 'shall have original jurisdiction', but by inquiring also whether it is one which under Sec. 51 could be brought, over the defendant's objection, in the District Court for the particular district within which it is pending in a State Court. The argument means, and counsel for plaintiff so claim, that a suit arising under the Constitution, or a law or treaty of the United States and brought

in a State Court within a particular Federal district is removable if the defendant be an inhabitant of that district, but not if he be an inhabitant of some district in another state—in other words, that in respect of the right to remove such a suit the statute discriminates against defendants who are inhabitants of the state and district where the suit is pending. We think the contention runs counter to both the letter and spirit of the statute.

Section 24 contains a typical grant of original jurisdiction to the District Courts in general of 'all suits' in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. *Section 51 does not withdraw any suit from that grant,* but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

Coming to the removal section (28), it is apparent that the clause 'of which the District Courts of the United States are given original jurisdiction' refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the *plural.* That it does not refer to the *venue provision in 51* is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by Sec. 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendant by Sec. 51, since removals are had only at the instance of defendants, and lastly, because the venue on removal is specially dealt with and fixed by Sec. 29."

Two propositions are thus definitely decided by this opinion.

First. The word "jurisdiction" in Section 28 of the Judicial Code refers to the jurisdiction granted to District Courts of the United States by Section 24. It

does not refer to the place in which a suit is required to be brought by Sec. 51 of the Judicial Code.

SECOND. The words "for the proper district" in Sec. 28 of the Judicial Code means the district in the boundaries of which the suit sought to be removed is pending in the State Court. It does not mean or refer to the districts specified in Sec. 51. In that case the court decides and says in so many words "the motion to remand was rightly denied".

Section 51 prescribes the particular District Court of the United States in which a suit may be brought when the jurisdiction of the District Court depends upon diversity of citizenship, as well as when it depends upon any other question, such as a right arising under the Constitution or Laws of the United States, or a controversy between citizens and aliens. But Sec. 51 does not describe or define the words "for the proper district" contained in Sec. 28. This court expressly so decides in *General Investment Co vs. Lake Shore R. Co., supra.*

It results inevitably that the present suit was a removable one and was removed to the District Court of the United States for the *proper district.* That therefore the motion of plaintiff in error to remand it to the State Court was properly overruled.

An affirmance of the judgment below is respectfully prayed.

E. L. WORTHINGTON,
Counsel for Defendant in Error.

LEWRIGHT BROWNING,
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Of Counsel.

LEE *v.* CHESAPEAKE & OHIO RAILWAY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 422. Argued January 5, 1923.—Decided January 22, 1923.

1. A case which, by virtue of the diverse citizenship of the parties, falls within the general jurisdiction of the District Courts as conferred by Jud. Code, § 24, is within the general jurisdiction of a District Court sitting in a State of which neither party is a citizen. P. 654.
2. The clause of Jud. Code, § 51, providing that such suits shall be brought only in the District Court in the district of the residence of either the plaintiff or the defendant does not limit the general jurisdiction created by § 24, or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert or waive, at his election. P. 655.
3. Whenever such a suit is removed from a state court under Jud. Code, § 28, the removal must be to the District Court in the district where the suit is pending. *Id.*, §§ 39, 53. P. 656.
4. The right of removal under § 28 is exercisable by the defendant or defendants without regard to the assent of the plaintiff. P. 658.
5. An action, between citizens of different States begun in a court of a State of which neither is a citizen, is removable by the defendant to the District Court of the district in which the suit is pending. P. 658. *Ex parte Wisner*, 203 U. S. 449, overruled; *In re Moore*, 209 U. S. 490, qualified.
6. The purpose of the Act of August 13, 1888, c. 866, 25 Stat. 433, to contract the jurisdiction of the Circuit Courts affords no basis for subtracting from its provisions where definite and free from ambiguity. P. 660.

Affirmed.

ERROR to a judgment of the District Court sustaining its jurisdiction and dismissing the complaint, in an action for personal injuries removed from a state court.

Mr. Allan D. Cole, with whom *Mr. H. W. Cole* and *Mr. W. A. Byron* were on the brief, for plaintiff in error.

Mr. E. L. Worthington, with whom *Mr. LeWright Browning* and *Mr. Stanley Reed* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action to recover damages in the sum of ten thousand dollars for personal injuries alleged to have been sustained by the plaintiff while entering one of the defendant's passenger trains in Kentucky for an intrastate trip. The plaintiff was a citizen and resident of Texas and the defendant a corporate citizen and resident of Virginia. The action was begun in a state court in Bracken County, Kentucky, and, because of the diverse citizenship of the parties, was removed, at the defendant's instance, into the District Court of the United States for the Eastern District of Kentucky, which includes Bracken County. When the transcript reached the District Court, the plaintiff moved that the cause be remanded to the state court on the ground that the District Court was without jurisdiction in that neither party was a resident of that district. The motion was overruled, the plaintiff elected to stand on the motion, and judgment was given for the defendant. The plaintiff then brought the case here on a direct writ of error, Jud. Code, § 238, to obtain a review of the ruling on his motion to remand.

Under the Constitution, Art. III, § 2, the judicial power extends, among other cases, to such as arise under the Constitution, laws and treaties of the United States; and to such as are between citizens of different States.

Section 24 of the Judicial Code defines the general jurisdiction of the District Courts, the pertinent provision being as follows:

"The district courts shall have original jurisdiction . . . of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy ex-

ceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, . . ."

This grant of jurisdiction covers two distinct classes of suits. In one the citizenship of the parties is not an element, while in the other it is the distinctive feature. As to the suit before us it is very clear that the diverse citizenship of the parties and the sum involved bring it within the latter class, and therefore within the general jurisdiction of the District Courts.

Section 51 of the Code relates to the venue of suits originally begun in those courts, and provides, subject to exceptions not material here, that—

". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789, that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege. *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300, 330; *Ex parte Schollenberger*, 96 U. S. 369, 378; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *United States* v. *Hvoslef*, 237 U. S. 1, 12; *Camp* v. *Gress*, 250 U. S. 308, 311; *General Investment Co.* v. *Lake Shore & Michigan South-*

ern Ry. Co., ante, 261. The following excerpt from *Interior Construction Co.* v. *Gibney*, p. 219, is particularly apposite:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

Section 28 of the Code deals with the jurisdiction of the District Courts on removals from the state courts, saying, so far as is material here,—

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the dis-

trict court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

Section 29 deals, among other things, with the venue on removals and shows that in every instance the removal must be into the district court "in the district where such suit is pending;" and this requirement is emphasized by § 53, which directs that where the district is composed of two or more distinct divisions the removal shall be into the District Court "in the division in which the county is situated from which the removal is made." Thus the words "for the proper district," in § 28, find exact definition in §§ 29 and 53; and that definition conforms to what has appeared in all removal statutes beginning with the original Judiciary Act of 1789.[1]

The several provisions of the Code before quoted were considered in the recent case of *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co., supra,* 275, where their meaning and their relation one to another were summed up as follows:

"Section 24 contains a typical grant of original jurisdiction to the District Courts in general of 'all suits' in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

[1] Acts September 24, 1789, c. 20, § 12, 1 Stat. 79; February 13, 1801, c. 4, § 13, 2 Stat. 92; February 4, 1815, c. 31, § 8, 3 Stat. 198; March 3, 1815, c. 94, § 6, 3 Stat. 233; March 3, 1863, c. 81, § 5, 12 Stat. 756; March 2, 1867, c. 196, 14 Stat. 558; March 3, 1875, c. 137, § 3, 18 Stat. 471; March 3, 1887, c. 373, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433; Judicial Code, §§ 30, 31, 33.

"Coming to the removal section (28), it is apparent that the clause, 'of which the district courts of the United States are given original jurisdiction,' refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in § 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by § 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by § 51, since removals are had only at the instance of defendants, and, lastly, because the venue on removal is specially dealt with and fixed by § 29."

It will be perceived that the right of removal under § 28 arises whenever a suit within the general jurisdiction of the District Courts is begun in "any" state court, and also that the party to whom the right is given is designated in direct and unequivocal terms. Where the suit arises under the Constitution, or a law or treaty, of the United States the right is given to "the defendant or defendants" without any qualification; and as to "any other suit" it is given to "the defendant or defendants", if he or they be "non-residents of that State." In neither instance is the plaintiff's assent essential in any sense to the exercise of the right. Nor is it admissible for him to urge that the removal be into the District Court for some other district, for it is his act in bringing the suit in a state court within the particular district which fixes the venue on removal.

Applying these views to the present case, we hold that it was removable, that it was duly removed into the District Court for the proper district and that the motion to remand was rightly denied—in short, that the District Court had jurisdiction to proceed to a determination of the cause.

The plaintiff's contention to the contrary is predicated largely on a decision by this Court in *Ex parte Wisner*,

203 U. S. 449, which, it must be conceded, is not in accord with the views expressed in this opinion. In that case the facts were like those here and the same statutory provisions were involved. These provisions were then part of the Act of August 13, 1888, c. 866, 25 Stat. 433, but, as respects the matter now under consideration, their meaning has not been changed by their inclusion in the Judicial Code. In that case it was ruled that the provision, now embodied in § 51, respecting the venue of actions originally begun in the Circuit (now District) Courts was strictly jurisdictional, could not be overcome even by the consent of both parties, and affected removals accordingly. The ruling proceeded on the theory that this was a right, if not a necessary, conclusion inasmuch as the general purpose of Congress in adopting the Act of 1888 was to contract the jurisdiction of the Circuit Courts. The decision was given in 1906 and was a departure from what had been said of the same provisions in prior cases, notably *Mexican National R. R. Co.* v. *Davidson*, 157 U. S. 201, 208, and *Sweeney* v. *Carter Oil Co.*, 199 U. S. 252, 259. Much that was said in the opinion was soon disapproved in *In re Moore*, 209 U. S. 490, where the Court returned to its former rulings respecting the essential distinction between the provision defining the general jurisdiction of the Circuit Courts and the one relating to the venue of suits originally begun in those courts. But as the decision was not fully and expressly overruled, it has been a source of embarrassment and confusion in other courts.[1] We had occasion to criti-

[1] See *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 218 Fed. 91; *Doherty* v. *Smith*, 233 Fed. 132; *Guaranty Trust Co.* v. *McCabe*, 250 Fed. 699; *James* v. *Amarillo City Light & Water Co.*, 251 Fed. 337; *Matarazzo* v. *Hustis*, 256 Fed. 882; *Boise Commercial Club* v. *Oregon Short Line R. R. Co.*, 260 Fed. 769; *Sanders* v. *Western Union Telegraph Co.*, 261 Fed. 697; *Earles* v. *Germain Co.*, 265 Fed. 715.

cise it in *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co., supra*, and now on further consideration we feel constrained to pronounce it essentially unsound and definitely to overrule it.

In this connection it should be observed that the opinion in *In re Moore* is open to the criticism that it seemingly assumes that where neither party is a resident of the district the removal, to be effective, needs the plaintiff's assent. We find no support for such an assumption in the provisions we are considering. Under them, as before indicated, the exercise of the right of removal rests entirely with the defendant and is in no sense dependent on the will or acquiescence of the plaintiff. The opinion in *In re Moore* is qualified accordingly.

We recognize that one purpose of the Act of 1888 was to contract the jurisdiction of the Circuit Courts and that due regard should be had for this in interpreting indefinite or ambiguous provisions; but we think it affords no basis for subtracting anything from provisions which are definite and free from ambiguity. A comparison of the removal provisions in the Act of 1888 with those in the Act of March 3, 1875, c. 137, 18 Stat. 470, which it displaced, will bring out very clearly the changes intended. The Act of 1875 not only permitted the removal of all suits between citizens of different States where the amount in controversy exceeded five hundred dollars, but declared without qualification that the removal might be by "either party." The Act of 1888 confined the removal of such suits to instances where the amount in controversy exceeded two thousand dollars; withheld the right of removal from the plaintiff, who always has a choice of forums, and gave the right to the defendant only where he was a nonresident of the State in which the suit was brought. Thus, while the comparison shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be

effected. Certainly there is nothing in this which suggests that the plain terms in the Act of 1888,—by which it declared that any suit "between citizens of different States," brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State,"—should be taken otherwise than according to their natural or ordinary signification.

That provision, although much narrower than the provision in the Act of 1875, is obviously broader than the one in the original Judiciary Act of 1789, which permitted any suit brought in any state court by a citizen of that State against a citizen of another State, and involving a stated amount, to be removed by the defendant into the Circuit Court of the United States for that district. This early provision remained in force for a long period and there can be no doubt that to return to it now would materially relieve the overburdened dockets of the District Courts and at the same time maintain the constitutional principle involved; but of course a return can be effected only through legislative channels.

Judgment affirmed.